IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 14, 2007

STATE OF TENNESSEE v. DEDRICK L. PATTON

Appeal from the Circuit Court for Rutherford County
No. F-50000 Don R. Ash, Judge

No. M2006-02564-CCA-R3-CD - Filed January 24, 2008

After waiving his right to a jury trial, Appellant, Dedrick L. Patton, was convicted in August of 2006 by a Rutherford County judge of possession of more than twenty-six grams of cocaine with the intent to sell or deliver.[1] Appellant was sentenced to ten years as a result of the conviction. On appeal, Appellant challenges the sufficiency of the evidence and his sentence. Because the evidence is sufficient to support the conviction for possession of cocaine with intent to sell or deliver, we affirm the conviction. With respect to Appellant's sentence, we determine that because Appellant waived his right to a jury trial, he has waived any issues with respect to *Blakely v. Washington*, 542 U.S. 296 (2004). Moreover, Appellant's prior criminal history more than supported the enhancement of his sentence. As a result, the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, and ALAN E. GLENN, JJ., joined.

R. Timothy Hogan, Murfreesboro, Tennessee, for the appellant, Dedrick L. Patton.

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[1] In 2001, Appellant pled guilty to one count of possession of less than .5 grams of cocaine with the intent to deliver with respect to the facts that supported the conviction at issue herein. *See Dedrick Patton v. State*, No. M2003-00126-CCA-R3-PC, 2003 WL 22999443, at *1 (Tenn. Crim. App., at Nashville, Dec. 23, 2003). As a result of the guilty plea, Appellant was sentenced to four years in incarceration. Appellant subsequently sought post-conviction relief on the basis that he received ineffective assistance of counsel and that his guilty plea was neither knowingly nor voluntarily made. *Id.* This Court concluded that trial counsel's failure to properly determine Appellant's range for sentencing purposes influenced Appellant to plead guilty rather than go to trial. *Id.* at *6. Further, this Court determined that Appellant's plea was not knowingly entered into because he was not given a "full and accurate appreciation of the potential penalties" he faced. *Id.* at *7. As a result of these conclusions, this Court reversed Appellant's conviction and remanded the case for a new trial. *Id.* at *8.

Robert E. Cooper, Jr., Attorney General & Reporter; Jennifer L. Bledsoe, Assistant Attorney General; and William C. Whitesell, Jr., District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Kenneth Cooper, a confidential informant, met Appellant, also known as "Cheese," at a gas station in late March or early April of 2000. Mr. Cooper got Appellant's phone number, and the two men chatted back and forth on the phone for about a week before Mr. Cooper asked Appellant if he could get some "white" or cocaine. Mr. Cooper told Appellant that he knew an individual who wanted to buy two ounces of cocaine. Appellant told Mr. Cooper that he could get the cocaine. Mr. Cooper made arrangements to purchase the cocaine from Appellant. Mr. Cooper then informed Lieutenant Al Watson of the narcotics division of the LaVergne Police Department,[2] among other law enforcement personnel, about the potential drug transaction.

After Mr. Cooper notified the officers, Mr. Cooper made telephone calls to Appellant in the officers' presence. The drug transaction was originally scheduled to take place on April 7, 2000. Appellant was scheduled to sell Mr. Cooper two ounces of cocaine for $1,200 an ounce. On April 7, Mr. Cooper called Appellant several times. Appellant informed Mr. Cooper that he was on his way. Mr. Cooper tried to contact Appellant several more times that day, but Appellant never showed up for the transaction. The police decided to abort their plans and attempt to try the transaction again at a later time.

On April 9, 2000, Appellant informed Mr. Cooper that he could get the cocaine. The next morning, Mr. Cooper called Lieutenant Nick Watson of the LaVergne Police Department to inform him that the deal was going to take place that day. Mr. Cooper met Appellant on Bell Road where Appellant showed Mr. Cooper the cocaine. Mr. Cooper noticed that Appellant was nervous. Appellant wanted assurance that the transaction was going to take place and that the buyers were legitimate. After viewing the drugs, Appellant followed Mr. Cooper to their prearranged meeting location, the Food Lion parking lot.

When they arrived in the parking lot, Appellant parked behind Mr. Cooper. Officer Edward McKenna of the LaVergne Police Department was waiting in the parking lot in a car so that he could participate in the controlled operation. Officer McKenna was the "buyer." He was responsible for

[2] At the time of trial, Lieutenant Al Watson was working for the Tennessee Alcohol Beverage Commission as a Special Agent. However, to avoid confusion, we will refer to him in this opinion as Lieutenant Watson, his position at the time of the events leading up to Appellant's conviction.

viewing the drugs, interacting with the informant, and giving the "takedown" signal when the exchange took place. Officer McKenna wore a bodywire during the transaction.

Officer McKenna saw Appellant and Mr. Cooper pull into the parking lot. Appellant was driving a blue Buick, and Mr. Cooper was driving a small gray car. Mr. Cooper waved Officer McKenna over to a closer parking spot. Mr. Cooper approached Officer McKenna and informed him that Appellant did not want to deal with anyone. Mr. Cooper told Officer McKenna that he would go get a sample of the cocaine from Appellant and come back. Mr. Cooper then walked to Appellant's car and came back to Officer McKenna's car. According to Officer Nick Watson, Appellant got out of the car, opened the back door, then got back into the driver's seat. Mr. Cooper handed Officer McKenna a bag containing a powdery white substance. At that time, Officer McKenna gave the takedown signal, and Appellant was arrested. Officer McKenna gave the cocaine to Officer Nick Watson.

The transaction was also observed by Lieutenant Al Watson, Lieutenant Nick Watson, and others. Lieutenant Nick Watson was parked in a vehicle in the parking lot facing east. From this location, he operated the KEL set, the device that recorded the audio from the bodywire worn by Officer McKenna. Lieutenant Al Watson was parked in the Food Lion parking lot, facing south. Lieutenant Al Watson's testimony was substantially similar to Officer McKenna's testimony.

Appellant was arrested. Lieutenant Nick Watson retrieved a clear plastic bag containing a rock powder substance that was tannish-white in color from Officer McKenna. The bag was then given to Lieutenant Al Watson, who secured the bag as evidence. Mr. Cooper received $500 as payment for assisting in the drug transaction.

The substance was analyzed by Special Agent Glen Glenn of the Tennessee Bureau of Investigation. According to Special Agent Glenn, the bag retrieved from the drug transaction contained 56.4 grams of cocaine.

At trial, Appellant waived his right to a jury. Appellant did not testify or present any proof. At the conclusion of the proof, the trial court found Appellant guilty of possession of more than twenty-six grams of cocaine with intent to sell or deliver. At a sentencing hearing, the trial court sentenced Appellant as a Range I, standard offender to ten years in incarceration. On appeal, Appellant challenges the sufficiency of the evidence and his sentence.

Analysis

Sufficiency of the Evidence

Appellant argues on appeal that the evidence was insufficient to support his conviction. Specifically, Appellant argues that the proof did not show that he was actually in possession of the drugs or gave the drugs to the informant. Further, he argues that there was no recording of any conversations between Appellant and Mr. Cooper that would indicate that Appellant "knowingly scheduled a drug transaction or conducted a drug transaction" and that Mr. Cooper was not searched

for drugs prior to the alleged transfer. In other words, Appellant complains that he was convicted solely on the basis of the testimony of the confidential informant, a person paid by the police on the basis of the quantity of drugs seized. Appellant contends that the circumstantial evidence of his guilt does not "exclude every other reasonable theory or hypothesis except that of guilt." The State contends that the proof supports the conviction for possession of more than twenty-six grams of cocaine with the intent to sell or deliver.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and "approved by the trial judge, accredits the testimony of the" State's witnesses and resolves all conflicts in the testimony in favor of the State. *State v. Cazes*, 875 S.W.2d 253, 259 (Tenn. 1994); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption "and replaces it with one of guilt." *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. *Id.* The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. *See* Tenn. R. App. P. 13(e); *Harris*, 839 S.W.2d at 75. In making this decision, we are to accord the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." *See Tuggle*, 639 S.W.2d at 914. As such, this Court is precluded from reweighing or reconsidering the evidence when evaluating the convicting proof. *State v. Morgan*, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own "inferences for those drawn by the trier of fact from circumstantial evidence." *Matthews*, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996).

Appellant was found guilty of violating T.C.A. § 39-17-417(a)(4), which makes it a crime to knowingly "possess a controlled substance with intent to manufacture, deliver or sell the controlled substance." A violation of T.C.A. § 39-17-417(a)(4) is a class B felony if the amount of the cocaine possessed is more than .5 grams. T.C.A. § 39-17-417(c)(1). Further, if the trial court found that Appellant possessed more than twenty-six grams of cocaine, he could be fined up to $200,000. T.C.A. § 39-17-417(i)(6).

Viewing the evidence in a light most favorable to the State, we conclude that the trial court had ample evidence to convict Appellant of possession of more than twenty-six grams of cocaine with the intent to sell or deliver. Mr. Cooper, a confidential informant who had worked forty to sixty deals involving drug purchases, orchestrated the purchase of the cocaine from Appellant at the Food Lion parking lot. On April 10, 2000, Appellant and Mr. Cooper met at the parking lot. The events were witnessed by Officer McKenna and Lieutenants Al and Nick Watson. Mr. Cooper left Officer McKenna's car, spoke to Appellant, and came back to Officer McKenna's car where he produced a bag containing 56.4 grams of cocaine. While there was no audiotape of the conversation between Appellant and Mr. Cooper, and Mr. Cooper was not searched prior to the drug transaction, the trial

court accredited the testimony of the State's witnesses. As stated previously, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. *Odom*, 928 S.W.2d at 23. Accordingly, we determine that the evidence was sufficient to support Appellant's conviction for possession of more than twenty-six grams of cocaine with the intent to sell or deliver.

Sentencing

Appellant also challenges his sentence. Specifically, Appellant argues that the trial court failed to apply certain mitigating factors. In that regard, Appellant argues that defense counsel should have informed the trial court of the following mitigating factors: (1) that Appellant's conduct "neither caused nor threatened serious bodily injury;" and (2) that "substantial grounds exist[ed] tending to excuse or justify Appellant's conduct, though failing to establish a defense." Further, Appellant argues that his sentence of ten years "as opposed to the minimum sentence of eight years" violates *Blakely v. Washington*, 542 U.S. 296 (2004), in which the Supreme Court held that the Sixth Amendment guarantee of a right to trial by jury prohibited fact finding by a judge, rather than a jury, if the factual findings were to form the basis of increasing a sentence beyond that allowed by the jury verdict alone. Specifically, Appellant argues that his sentence was invalid because the trial court relied on facts other than Appellant's prior convictions to enhance his sentence without submitting those facts to a jury.[3] Additionally, at the time the briefs were filed in this case, *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005), in which the Tennessee Supreme Court determined that Tennessee's sentencing scheme did not violate the Sixth Amendment, had been reversed and remanded by the United States Supreme Court, but the Tennessee Supreme Court had yet to issue an opinion on remand. Appellant asked that this Court reserve ruling on the sentencing issue until the opinion on remand in *Gomez* was filed.[4] The State disagrees with Appellant's argument, contending that the trial court properly sentenced Appellant to a ten-year sentence.

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[3]Effective June 7, 2005, the Tennessee General Assembly, in response to *Blakely*, amended T.C.A. §§ 40-35-102, -210, and -401 to reflect the advisory nature of enhancement factors. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 1, 6, 8. The amendment, among other things, removed the presumptive sentence language from our Sentencing Act and mandated only that the trial "court shall impose a sentence within the range of punishment . . . ." *Compare* T.C.A. § 40-35-210(c) (Supp. 2005) *with* T.C.A. § 40-35-210(c) (2003). The legislature also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Act ch. 353, § 18. In addition, if a defendant committed a criminal offense on or after July 1, 1982 and was sentenced after June 7, 2005, such defendant can elect to be sentenced under these provisions by executing a waiver of their ex post facto protections. *Id.* Appellant herein committed the offenses on April 10, 2000, and was sentenced on October 13, 2006. There is no waiver executed by Appellant in the record herein. Thus, the amendments to the Sentencing Act do not apply to Appellant.

[4]Since the briefs were filed, but prior to the release of this opinion, the supreme court's opinion on remand, *State v. Gomez*, ___ S.W.3d ___, No. M2002-01209SC-R11-CD, 2007 WL 2917726, at *6 (Tenn. Oct. 9, 2007), was filed.

Initially, we note that Appellant executed a written waiver of his right to jury trial and requested a bench trial on August 25, 2006. In *State v. Elijah Hammond*, No. E2004-01061-CCA-R3-CD, 2005 WL 877051, at *12 (Tenn. Crim. App., at Knoxville, Apr. 15, 2005), *perm. app. denied*, (Tenn. Aug. 29, 2005), this Court determined that "because the trial court served as the fact finder at trial pursuant to the defendant's waiver of the right to a jury trial," there were no discernable "issues arising from the Supreme Court's opinion in *Blakely*." Consequently, because Appellant waived the right to a jury trial herein, he cannot now complain on appeal that his sentence violates *Blakely*.

Moreover, in determining the length of Appellant's sentence, the trial court relied on the following enhancement factors: (1) the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range. T.C.A. § 40-35-114(1). As a result, the trial court sentenced Appellant to ten years. The Tennessee Supreme Court has determined that a trial court can "properly consider without jury findings a defendant's prior convictions, as well as prior criminal behavior admitted to by a defendant, when imposing sentence." *State v. Gomez*, No. M2002-01209-SC-R11-CD, ___ S.W.3d ___, 2007 WL 2917726, at *7 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 488-90 (2000)). The presentence report indicates that Appellant had prior convictions for possession of cocaine with the intent to sell, simple assault, two weapons offenses, two convictions for evading arrest and three convictions for possession of drugs. Appellant's record of prior convictions alone amply supports the enhancement of Appellant's sentence to ten years. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE